HOAGLAND, LONGO, MORAN, DUNST & DOUKAS, LLP
40 Paterson Street, P.O. Box 480
New Brunswick, NJ 08903
(732)545-4717
Attorneys for Defendants, City of New Brunswick, City of New Brunswick Police Department and Patrolman James Feaster

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
TRENTON, NEW JERSEY

Plaintiff, MICHAEL BOSWELL vs. *Defendants,* STEVE EOON, KIRSTEN BYRNES, CHRISTINA EICKMAN, PTL. JAMES FESITER, NEW BRUNSWICK POLICE DEPARTMENT, CITY OF NEW BRUNSWICK; and JOHN DOES (#1 thru #5)	Garrett E. Brown, Jr. CIVIL ACTION NO. 3:08-cv-5098(GEB-LHG) **ELECTRONICALLY FILED**

DEFENDANTS' CITY OF NEW BRUNSWICK, CITY OF NEW BRUNSWICK POLICE DEPARTMENT AND OFFICER FEASTER'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

HOAGLAND, LONGO, MORAN,
DUNST & DOUKAS, LLP
Attorneys for Defendants, City of New Brunswick, City of New Brunswick Police Department and Patrolman James Feaster
40 Paterson Street, P.O. Box 480
New Brunswick, NJ 08903
(732) 545-4717

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF MATERIAL FACTS 1

LEGAL ARGUMENT

POINT I

PLAINTIFF'S MOTION FOR
RECONSIDERATION SHOULD BE DENIED
AND THE ORDER GRANTING SUMMARY JUDGMENT TO
THE NEW BRUNSWICK DEFENDANTS SHOULD NOT BE MODIFIED . . . 4

CONCLUSION 12

TABLE OF AUTHORITIES

(Cases)

Blain v. Township of Radnor, 167 Fed. Appx. 330 (3d Cir. 2006) 10

Bowers v. NCAA, 130 F. Supp. 2d 610 (D.N.J. 2001) 6

Callahan v. A.E.V. Inc., 182 F.3d 237 (3d Cir. 1999) 10

DeMerrell v. City of Cheboygan, 206 Fed. Appx. 418 (6th Cir. 2006) 10

Egloff v. New Jersey Air. Nat. Guard, 684 F. Supp. 1275 (D.N.J. 1989) 6

Florham Park Chevron, Inc. v. Chevron U.S.A. Inc.,
680 F. Supp. 159 (1988) 6

G-69 v. Degnan, 748 F. Supp. 274 (D.N.J. 1990) 6

Gutierrez v. Ashcroft, 289 F. Supp. 2d 555 (D.N.J. 2003) 6

Harsco Corp. v. Zlotnicki, 779 F.2d 906 (3d Cir. 1985) 4

Horton v. Cosme, 2008 U.S. Dist. LEXIS 51693 (D.N.J. July 8, 2008) 8

In re Burns and Roe Enterprises,
2009 U.S. Dist. LEXIS 41633 (D.N.J. May 15, 2009) 10

Max's Seafood Café ex rel. Lou-Ann v. Quinteros,
176 F.3d 669 (3d Cir. 1999) 4, 5

Medina v. Cram, 252 F.3d 1124 (10^{th} Cir. 2001) 10

NL Industries Inc. v. Commercial Union Insurance,
935 F. Supp. 513 (D.N.J. 1996) 4, 7

North River Ins. Co. v. CIGNA Reins. Co., 52 F.3d 1194 (3d Cir. 1995) 5

P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp., 161 F. Supp. 2d 349 (D.N.J. 2001) 6, 7

Pelham v. United States, 661 F. Supp. 1063 (D.N.J. 1987) 7

Perdomo v. United States of America, 2009 U.S. Dist. LEXIS 14637 (D. N.J. 2009) 5

Porter v. United States, 2006 U.S. Dist. LEXIS 64835 (D.N.J. 2006) 5

Tishcio v. Bontex Inc., 16 F. Supp. 2d 511 (D.N.J. 1998) 7

U.S. v. Compaction Sys. Corp., 88 F. Supp. 2d 339 (D.N.J. 1999) 6

United States Small Business Administration v. Stefansky, 2010 U.S. Dist. LEXIS 22603 (D.N.J. March 10, 2010) 10

United States v Jones, 158 F.R.D. 309 (D.N.J. 1994) 7, 11

Yurecko v. Port Auth. Trans-Hudson Corp., 279 F. Supp. 2d 606 (D.N.J. 2003) 7

(Rules)

New Jersey District Court Local Civil Rule 7.1(i) 4

STATEMENT OF MATERIAL FACTS

1. On February 25, 2010, the Defendants, City of New Brunswick, the New Brunswick Police Department and Officer James Feaster filed a motion for summary judgment seeking dismissal of all counts of Boswell's complaint. (Docket No. 28, Defendants, New Brunswick, New Brunswick Police Department and Feaster's motion for summary judgment). Contained within that motion was a statement of undisputed material facts. (See Doc. No. 28-2 and attached hereto as Exhibit A, New Brunswick Defendants Statement of Material Facts).

2. Plaintiff submitted a brief in opposition to said motion and contained within the same was a responding statement of material facts. (See Doc. No. 35, Plaintiff's opposition papers and Plaintiff's Exhibit B of Plaintiff's motion seeking reconsideration).

3. A reply to Plaintiff's opposition was submitted by the New Brunswick defendants on March 26, 2010. (Doc. No. 37, Reply papers of the New Brunswick defendants).

4. On June 8, 2010, Chief Judge Garrett Brown issued a Memorandum Opinion and Order granting summary judgment as to the New Brunswick defendants as to the federal claims and declining to exercise supplemental jurisdiction over

Boswell's remaining state law claims. (See Doc. No. 41, Memorandum Opinion and Doc. No. 42 Order, dated June 8, 2010).

5. In that opinion, Chief Judge Brown stated that he had "considered the parties' submissions..." and made specific references to the New Brunswick Defendants' statement of facts as well as the statement of facts contained in Boswell's opposition papers. (See Doc. 41 at p. 1-3).

6. On June 18, 2010, Boswell filed a motion for reconsideration of the June 8, 2010 Order based upon findings contained in the Memorandum Opinion. (See Doc. No. 43. Plaintiff's motion for reconsideration).

7. In that motion, Boswell's counsel takes issue with the following statement contained in the Memorandum Opinion at page 6: "Because both parties agree that Officer Feaster did not know Boswell was intoxicated when he directed him to leave the park, Officer Feaster did not know of and disregard a risk to Boswell's safety." (Doc. No. 43, Plaintiff's motion for reconsideration, statement of facts at p. 1 and 6, citing Doc. 41, Memorandum Opinion, at p. 6.)

8. In reconsideration papers, Boswell further contends that he did "not admit to the claims Officer Feaster made in his deposition testimony...." and specifically refers the Court to paragraphs 41, 42, and 44 of the Defendants' statement

of facts and Plaintiff's corresponding responses in opposition thereto. (See Doc. No. 43, Plaintiff's motion for reconsideration, statement of facts, at p. 3, 4, 5.)

9. In reconsideration papers, Boswell further reiterates the content of his experts' opinions which Boswell contends countered these "claims" by Officer Feaster. (See Doc. No. 43 , Plaintiff's motion for reconsideration, statement of facts, at p. 3, 4, 5 and 6).

10. As such, Boswell contends that this Court "overlooked, misunderstood, or misconstrued" the submissions of the parties in reaching it's decision. (See Doc. No. 43, Plaintiff's motion for reconsideration, statement of facts, at p. 1, 6)

11. Boswell does not contend that either a change in the law has occurred since the disposition of the motion for summary judgment or that new evidence not previously available has emerged. As such Boswell provides no "new" information in his reconsideration motion.

LEGAL ARGUMENT

POINT I

PLAINTIFF'S MOTION FOR RECONSIDERATION SHOULD BE DENIED AND THE ORDER GRANTING SUMMARY JUDGMENT TO THE NEW BRUNSWICK DEFENDANTS SHOULD NOT BE MODIFIED

New Jersey District Court Local Civil Rule 7.1(i) provides:

> A motion for reconsideration shall be served and filed within 14 days after the entry of the order or judgment on the original motion by the Judge or Magistrate Judge. A brief setting forth concisely the matter or controlling decisions which the party believes the Judge or Magistrate Judge has overlooked shall be filed with the Notice of Motion.

L. Civ. R. 7.1(i) allows a party to seek reconsideration of "matters or controlling decisions which counsel believes the Judge or Magistrate Judge has overlooked." NL Industries Inc. v. Commercial Union Insurance, 935 F. Supp. 513, 515 (D.N.J. 1996). The Third Circuit has held that the "purpose of a motion for reconsideration . . . is to correct manifest errors of law or fact or to present newly discovered evidence." Max's Seafood Café ex rel. Lou-Ann v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999)(quoting Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985)) (internal quotations omitted).

Motions for reconsideration will only be considered where: (1) an intervening change in the law has occurred; (2) new evidence not previously available has become available; or (3) there is a need to correct a clear error of law or fact or to prevent a manifest injustice. Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999)(citing North River Ins. Co. v. CIGNA Reins. Co., 52 F.3d 1194, 1218 (3d Cir. 1995)).

In this matter, Boswell does not contend that either an intervening change in the law has occurred or that new evidence not previously available has emerged. In the reconsideration brief, Boswell cites to the United States District Court decisions of Perdomo v. United States of America, 2009 U.S. Dist. LEXIS 14637 (D. N.J. 2009)(Chesler) and Porter v. United States, 2006 U.S. Dist. LEXIS 64835 (D.N.J. 2006)(Pisano) as evincing support of his position. However, in both Perdomo and Porter, the Court was presented with additional information in the motion for reconsideration, which had not been provided at the time the original motion was determined. Here, Boswell provides no "new" information in his reconsideration motion. Accordingly, Plaintiff's reliance on these cases, in light of the arguments that he has made, is misplaced. Further, Boswell does not argue, in his motion for reconsideration, that this Court made a clear error of law or should act to prevent a manifest injustice.

Boswell's only argument in seeking reconsideration is that certain specific facts were overlooked by the Court in reaching it's decision. As such, Plaintiff has the burden of establishing that these facts were previously brought to the Court's attention, were not considered, and would alter the disposition of the matter, before Plaintiff's motion for reconsideration could be granted. U.S. v. Compaction Sys. Corp., 88 F. Supp. 2d 339, 345 (D.N.J. 1999); P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp., 161 F. Supp. 2d 349, 353 (D.N.J. 2001). A motion for reconsideration will be denied for failure of the Plaintiff to "provide the court with any pertinent case law or fact which this court may have overlooked". Egloff v. New Jersey Air. Nat. Guard, 684 F. Supp. 1275, 1279 (D.N.J. 1989).

"The word 'overlooked' is the operative term in the Rule." Bowers v. NCAA, 130 F. Supp. 2d 610, 612 (D.N.J. 2001). Reconsideration motions may not be used to re-litigate old matters, nor to raise arguments or present evidence that could have been raised before the entry of judgment. P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp., 161 F. Supp. 2d 349, 352 (D.N.J. 2001). Similarly, 'a recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." Bowers, 130 F. Supp. 2d at 613, citing G-69 v. Degnan, 748 F. Supp. 274, 275 (D.N.J. 1990); See also Gutierrez v. Ashcroft, 289 F. Supp. 2d 555, 561 (D.N.J. 2003). A difference of opinion with the Court's decision is not an appropriate basis upon which to grant reconsideration. Bowers v. NCAA, 130 F. Supp. 2d 610, 612 (D.N.J. 2001); Florham Park Chevron, Inc. v.

Chevron U.S.A. Inc., 680 F. Supp. 159, 162 (1988) and Tishcio v. Bontex Inc., 16 F. Supp. 2d 511, 533 (D.N.J. 1998) ("a motion for reconsideration should not provide the parties with an opportunity for a second bite at the apple").

The standard for reargument is high and reconsideration is to be granted only sparingly. See United States v Jones, 158 F.R.D. 309, 314 (D.N.J. 1994). Simply, to grant Boswell's motion for reconsideration of this Court's June 8, 2010 Opinion and Order would be an extraordinary remedy,. Yurecko v. Port Auth. Trans-Hudson Corp., 279 F. Supp. 2d 606, 608-09 (D.N.J. 2003); P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp., 161 F. Supp. 2d 349, 353 (D.N.J. 2001); see NL Indus. Inc. v. Commercial Union Ins. Co., 935 F. Supp. 513, 516 (D.N.J. 1996); Pelham v. United States, 661 F. Supp. 1063, 1065 (D.N.J. 1987).

In this case, the Court accepted those facts which were undisputed in making it's determinations concerning the grant of summary judgment. (Opinion at p.6) Boswell now contends, in the motion for reconsideration, that facts #41, 42, and 44 were disputed. (Pb3, 8). Boswell, in the motion for reconsideration, now alleges that because the word "claims" was used in Plaintiff's statement of facts, at paragraphs #41, 42 and 44, that Boswell was only agreeing that Officer Feaster made theses statements, but was not agreeing with the substance of those statements. In the motion papers, Plaintiff further advises the Court that they had readily agreed to some of Officer's Feaster's testimony (Pb1 and 2) , but that the word "claims" contained in paragraphs #41, 42 and 44 should have alerted the Court that they did not admit to these facts and that these specific facts were disputed. However, in reviewing the Plaintiff's response to New Brunswick's statement of facts, it is clear that counsel used the terms "stated", "claims", "testified" and "indicated" interchangeably when referring to Officer Feaster's testimony. (See Plaintiff's Statement of facts, e.g.: paragraphs 32, 34, 35, 37, 40, 41, 42, 43, 44, and 45). Plaintiff's attempt to now parse his words is not a basis upon which to grant reconsideration. Further, Boswell responded to some of New Brunswick's statement of facts with "additions". (See Plaintiff's statement of facts e.g. paragraphs #15a, 23a -b, 32a, 40a, 42a, 50a, 54 a-e, 55a-h, and 56 a-f). It is noted that Boswell's additions to the factual paragraphs at issue made no mention of this "disbelief" of Feaster's testimony. Simply Plaintiff did not deny these facts and as such, same should be considered an admission. See Horton v. Cosme, 2008 U.S. Dist. LEXIS 51693 (D.N.J. July 8, 2008)(Brown). (See Exhibit B, Horton decision attached hereto). The Court was correct in construing these facts as admitted and Boswell's basis for questioning whether the Court "misunderstood" the facts of this case is without merit.

Plaintiff also asserts that this Court "overlooked" the opinions of Boswell's experts which further demonstrated an issue of material fact (Pb3, 4,and 5) and that "these conflicts and disputed facts were vigorously argued by plaintiffs in Point I of their brief [in opposition to summary judgment] to show that summary judgment was inappropriate in light of the disputed material facts.". (Pb9). In reply papers, the New Brunswick defendants responded to these arguments with:

> As to the liability of Officer Feaster, Boswell attempts to create a issue of material fact concerning whether Mr. Boswell was visibly intoxicated and as such, whether Officer Feaster should have observed those signs and symptoms of intoxication and removed Mr. Boswell from Boyd Park. First, it is uncontroverted that other than Officer Feaster and Mr. Boswell, who no longer can recall the incident, there were no fact witnesses to the exchange between Officer Feaster and Mr. Boswell. As such, Officer Feaster's sworn testimony concerning his observations of Mr. Boswell remains undisputed. It was Officer Feaster's sworn testimony that Mr. Boswell understood Officer Feaster, was cooperative, responded immediately and appropriately to Officer Feaster and was clear and coherent in his speech[1]. Mr. Boswell's physical coordination, in sitting on the bench and in walking away from Officer Feaster, was controlled and balanced. It is also uncontroverted that Officer Feaster did not observe Mr. Boswell drinking from the quart bottle of beer, which was later found underneath the picnic bench. As such, Officer Feaster made sufficient observations of Plaintiff and made a determination that Mr. Boswell was not intoxicated. Further, Plaintiff has failed to present one witness who observed Mr. Boswell prior to the accident and can testify that he displayed visible signs of intoxication. (New Brunswick's reply brief, Doc. No. 37 at p. 6.)
>
> Further, Mr. Saferstein's opinion, alone, does not create a genuine issue of fact. Callahan v. A.E.V. Inc., 182 F.3d 237, 256 (3d Cir. 1999);

---

[1] Plaintiff attempts to make this an issue of fact by maintaining that Officer Feaster could not understand what Mr. Boswell was saying. (Pb26). However, as set forth in Defendants' statement of facts as well as Plaintiff's statement of facts (Pb10, para. 33, 38), the reason that Officer Feaster could not understand Mr. Boswell was because Mr. Boswell was too far away to be understood, when he mumbled something as he walked away. Thus, there is no issue of fact concerning Officer Feaster's observations.

> Medina v. Cram, 252 F.3d 1124, 1133 (10th Cir. 2001) (citations omitted); Blain v. Township of Radnor, 167 Fed. Appx. 330 (3d Cir. 2006). As indicated, Mr. Saferstein fails to apply his theories and conclusions to the particular individual's actions at issue in this case. Second, Mr. Saferstein's opinions ignore the uncontroverted facts, that being Officer Feaster's observations. DeMerrell v. City of Cheboygan, 206 Fed. Appx. 418, 426-27 (6th Cir. 2006). (New Brunswick's reply brief, Doc. No. 37 at p. 7).

It is clear that Boswell's position espoused in this motion for reconsideration was previously argued in opposition to the original motion. Boswell is arguing, in essence, that the Court should have ruled in his favor. Boswell's disagreement with the Court's conclusions is not an appropriate basis for granting a motion for reconsideration. Further, Boswell's recapitulation of his position does not meet the exacting standard of reconsideration. Boswell has failed to convince this Court that it's June 8, 2010 decision should be altered. "All of the arguments and factual citations made in Plaintiff's motion for reconsideration were stated previously.... and the Court previously considered each and every document and argument previously presented." United States Small Business Administration v. Stefansky, 2010 U.S. Dist. LEXIS 22603 at *6 (D.N.J. March 10, 2010)(Brown). (See Exhibit C, United States SBA decision attached hereto). See also In re Burns and Roe Enterprises, 2009 U.S. Dist. LEXIS 41633 (D.N.J. May 15, 2009)(Brown) (See Exhibit D, In re Burns decision attached hereto.)([T]he Court considered all of the FFIC's submissions... [and] is satisfied that the plain terms of the Confirmation Order are clear.....Movants simply disagree with the outcome of the Confirmation Opinion which is not the proper subject matter for a motion for reconsideration". Id. at *20-21, citations omitted).

Similarly, Plaintiff has made a request that regardless of whether the Court alters it's decision, that this Court change it's factual findings. (Pb14). As indicated above, the Court did not overlook or misunderstand the facts and/or theory of liability in determining the original motion for summary judgment. Disagreement with the Court's Opinion is simply not enough to grant this extraordinary request.

The Court's findings of fact in it's June 8, 2010 opinion are entirely consistent with the statement of facts presented by both parties. This is not one of those rare instances in which reconsideration is warranted and as such, it is requested that Boswell's motion for reconsideration be denied.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Plaintiff's Motion for Reconsideration be denied.

Respectfully submitted,

HOAGLAND, LONGO, MORAN,
DUNST & DOUKAS, LLP
Attorneys for Defendants, City of New Brunswick, City of New Brunswick Police Department and Patrolman James Feaster

By: ______________________
SUSAN K. O'CONNOR

Dated: July 2, 2010